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**No. 94-3**

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IN THE  
**Supreme Court of the United States**

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October Term, 1994

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REYNOLDSVILLE CASKET CO., *et al.*,  
*Petitioners,*

vs.

CAROL L. HYDE,  
*Respondent.*

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ON WRIT OF CERTIORARI TO  
THE SUPREME COURT OF OHIO

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**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF  
AND BRIEF OF THE DALKON SHIELD CLAIMANTS  
TRUST IN SUPPORT OF PETITIONERS**

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## MOTION TO APPEAR AS *AMICUS*

The Dalkon Shield Claimants Trust ("Trust") respectfully requests leave to appear as *amicus curiae* in support of Petitioner on the appeal of the merits of this matter.

On October 3, 1994, this Court granted the Trust's motion for leave to file as *amicus* in support of the petition for writ of certiorari. The Petitioner had consented to such participation; Respondent had refused consent. Pursuant to Supreme Court Rule 37.3, the Trust again requested all parties to agree, in writing, to the Trust's participation as *amicus curiae*. See Exh. A, attached. Petitioner gave such consent (see Exh. B, attached); Respondent refused. The same reasons that supported the Trust's appearance as *amicus* on the petition, summarized below, support its appearance as *amicus* on the merits of the appeal.

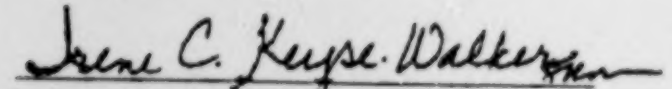
Three *amici* appeared on Respondent's behalf in the Ohio Supreme Court. Although the individual facts of *Hyde v. Reynoldsville Casket Co.*, 68 Ohio St. 3d 240, 626 N.E.2d 75 (1994), involve a traffic accident, those *amici* presented the case as potentially barring hundreds of lawsuits filed in Ohio by Ohio residents allegedly injured by their use of a Dalkon Shield intrauterine device ("IUD"). The 28-page brief filed by *amicus curiae* Brown & Szaller Co., L.P.A., claimed to speak on behalf of "350 clients" with Dalkon Shield claims within the state. The Ohio Academy of Trial Lawyers filed a 44-page *amicus* brief on behalf of numerous plaintiffs, "including multiple Dalkon Shield Litigants." The law firm of Spangenberg, Shibley, Traci, Lancione & Liber also filed a lengthy *amicus* brief on behalf of women in Ohio with claims pending against the

Dalkon Shield Claimants Trust. The two law firm *amici* strenuously argued that their clients had "relied on" pre-*Bendix* law to decide "when" to file suit against A.H. Robins, and would be harmed by the retroactive application of *Bendix*. They also filed "reply briefs," and counsel from Brown & Szaller presented the oral argument in the Ohio Supreme Court on behalf of Respondent.

Having sought—or at least consented to—the participation of three *amici* in the Ohio Supreme Court, Respondent cannot now claim to have a reasonable basis for refusing to consent to *amicus* participation by the Trust in the United States Supreme Court. By permitting a Dalkon Shield Claimants attorney to present oral argument in the Ohio Supreme Court, Respondent has clearly conceded that this is not a case only about two individuals in an automobile accident. The issues herein have a much broader implication, and especially to Dalkon Shield Claimants and the Trust. Entities representing those interests present a unique and helpful perspective to this Court.

The Trust therefore renews its motion for leave to appear as *amicus*—a motion granted at the petition stage—and leave to file the attached proposed *amicus* brief in support of Petitioner.

Respectfully submitted,



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**QUESTION PRESENTED FOR REVIEW**

May the Ohio Supreme Court refuse to follow the rule of law established by this Court in 1988 when this Court determined that Ohio's tolling statute was unconstitutional and that rule of law was applied to the parties before the Court?



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**AMICUS CURIAE BRIEF OF  
THE DALKON SHIELD CLAIMANTS TRUST  
IN SUPPORT OF PETITIONERS**



## **I. INTEREST OF THE AMICUS**

This Brief is submitted on behalf of the Dalkon Shield Claimants Trust ("Trust"). The Trust was established to administer and distribute a limited fund to compensate users of the Dalkon Shield intrauterine device ("IUD") for injuries suffered as a result of its use.

The Trust has a compelling interest in the decision below, which deprives the Trust of its statute of limitations defense in Ohio. The effect of the Ohio Supreme Court's decision is to encourage litigation over the carefully crafted claims resolution procedures followed by the Trust. Those procedures provide fair and equitable compensation to claimants with a mechanism which favors settlement over arbitration and litigation, thereby reducing transactional costs and preserving Trust assets for the benefit of deserving claimants.

By failing to apply controlling U.S. Supreme Court precedent, the Ohio Supreme Court has given Ohio's unconstitutional tolling statute new life. In so doing, the Ohio Court encourages the depletion of Trust funds through litigation by Ohio claimants. A brief background of the Trust will illustrate the adverse and discriminatory impact of *Hyde v. Reynoldsville Casket Co.*, 68 Ohio St. 3d 240, 626 N.E.2d 75 (1994).

### A. The Dalkon Shield Claimants Trust and Claims Resolution Facility.

A.H. Robins, manufacturer of the Dalkon Shield IUD, filed for bankruptcy in 1985, on the heels of thousands of lawsuits filed by Dalkon Shield IUD users. During the pendency of that bankruptcy, some 197,000 persons (hereafter "Dalkon Shield Claimants") filed claims. All claims filed with the bankruptcy court prior to April 30, 1986, were declared "timely" for bankruptcy purposes.

A plan of reorganization ("Plan"), was confirmed in 1988, and consummated in 1989.<sup>1</sup> The Plan called for a unique approach to compensate as many claimants as possible through a \$2.23 billion fund administered by the Trust. The fund was for the sole benefit of the Dalkon Shield Claimants—any funds remaining after the payment of claims and administrative expenses "will be distributed pro rata to claimants . . . ." *In re A.H. Robins, Inc.*, 880 F.2d 769, 771 (4th Cir. 1989).

The Plan seeks to maximize individual compensation through an innovative claims resolution process. Specifically, the Plan established a Claims Resolution Facility ("CRF"), implemented by the Trust's five Trustees, that favors dispute resolution mechanisms with the lowest transactional costs. See Exhibit 4 to the Plan, attached hereto as Exh. C.

<sup>1</sup> A summary of the proceedings and Plan is set forth in *In re A.H. Robins Co., Inc.*, 88 B.R. 742 (E.D. Va. 1988) and 88 B.R. 755 (E.D. Va. 1988), and appellate decisions of that same name, 880 F.2d 694 (4th Cir. 1989); 880 F.2d 709 (4th Cir. 1989); and 880 F.2d 769 (4th Cir. 1989).

The CRF's four-pronged directive drives every decision underlying the Trust's claims review process:

1. Provide an efficient economical mechanism for liquidating claims which favors settlement over arbitration and litigation, thereby reducing transaction costs;

2. Provide claimants with an attractive alternative to trial by jury where settlement is not achieved;

3. Provide fair and equitable compensation based upon historic values, updated by current developments, to persons injured by the Dalkon Shield; and

4. Provide no compensation to persons not injured by the Dalkon Shield.

Exh. C, p. C1, §A. These guidelines seek to provide fair and equitable compensation in an efficient mechanism which reduces transaction costs.

### B. The Compensation Options for Dalkon Shield Claimants Across the Nation and in Ohio.

Consistent with the above guidelines, the CRF provides all Dalkon Shield Claimants with three<sup>2</sup> "options" for obtaining compensation. Option 1 provides a fixed payment for *de minimis* claims. Option 2 provides payment for more serious injury according to a schedule, without requiring proof of medical causation. Option 3 provides a detailed, individualized evaluation by the Trust of claims supported by medical records and evidence of medical causation to produce an offer of compensation to the

<sup>2</sup> A fourth "option" permits a Claimant to defer consideration of his or her claim without waiving any right to that claim.



Claimant for all injuries caused by the Dalkon Shield IUD. There is no minimum or maximum award in this category—every Option 3 claim is accorded “fair and equitable compensation, based upon historic values, updated by current developments . . . .” Exh. C, p. C1, §A.

A Claimant who is dissatisfied for whatever reason with her Option 3 offer may choose among a number of dispute resolution mechanisms. An Alternative Dispute Resolution (“ADR”) procedure is designed to provide an expedited hearing (not to exceed several hours in length) before a neutral evaluator appointed by the Private Adjudication Center, Inc., affiliated with the Duke University School of Law. In ADR—which has a \$20,000 ceiling—the Trust is not represented by counsel, may not assert any statute of limitations defense, and product defect is not an issue.

A dissatisfied Option 3 Claimant may also choose the alternative of Arbitration before an appointed neutral arbitrator. At Arbitration—which has no monetary ceiling—the parties may be represented by counsel, but the Trust cannot contest product defect. However, a three-year limitations period is specified by the governing Arbitration Rules.

Finally, for Option 3 Claimants who so choose, traditional litigation may be pursued in the applicable state or federal court. The Trust may raise all available defenses in such litigation, including absence of product defect and the statute of limitations of the appropriate jurisdiction.

To date, the Trust has paid 118,943 Option 1 claims and 13,732 Option 2 claims. Over 92 percent of all Option 3 claims have been reviewed. Of the Option

3 Claimants whose claims have been reviewed, 92 percent have accepted the proposed payment or moved to ADR. Compensation payments for Options 1, 2, and 3 total over \$1.2 billion to 165,915 Claimants.

### C. The Effect of *Bendix* on Ohio Dalkon Shield Claimants.

As noted, all claims against A.H. Robins filed with the Bankruptcy Court prior to April 30, 1986, were declared “timely” for bankruptcy purposes by the United States District Court for the Eastern Division of Virginia—whether or not there was an arguable statute of limitations defense. All of these claims were therefore eligible for the CRF’s multifaceted claims resolution procedures.

Further, in an effort to encourage voluntary claim resolution over litigation, the CRF was promulgated and implemented in such a way as to ensure that *all* of these claims could be compensated without any consideration whatsoever as to whether the claim was timely from a limitations standpoint. For example, the Trust cannot consider or assert the defense of the statute of limitations against a Claimant who chooses Option 1 or 2. Nor is such a defense asserted against a Claimant or accorded any weight during the individualized evaluation process of Option 3 claims. The Trust asserts the Ohio statute of limitations *only* after an Ohio Claimant has rejected the Trust’s Option 3 best and final settlement offer, *and* has rejected alternative dispute resolution mechanisms put in place to avoid costly litigation in the state and federal court system.



All Ohio Claimants' counsel who rejected Option 3 offers did so long after this Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988) (hereinafter "*Bendix*"). All Ohio Claimants' counsel who chose costly litigation over claims resolution did so knowing that the Trust could and would assert all available defenses—including the statute of limitations. Presumably, numerous counsel advised their Ohio clients to accept the Option 3 settlement offers, or pursue alternate dispute resolution, because the Trust could assert the Ohio statute of limitations in any litigation against it and the Claimant would not be able to rely on the tolling statute determined by this Court to be unconstitutional in 1988.

## II. SUMMARY OF ARGUMENT

The decision on review contains two holdings. The first holding stems from the Ohio Supreme Court's erroneous conclusion that the prospective/retroactive application of *Bendix* is a matter of first impression for it to decide. The court then exercises its presumed power by holding that this Court could and would embrace the rejected doctrine of selective prospectivity. In the second part of its opinion, the Ohio Supreme Court holds, in the alternative, that the retroactive application of *Bendix* does not require a dismissal of Respondent's claims. Specifically, the court's majority holds that it can "tailor" a "remedy" from the Ohio Constitution that will shield Respondent from the dismissal mandated by *Bendix*.

The Ohio Supreme Court's first holding is in direct conflict with *Harper v. Virginia Dept. of Taxation*, 509 U.S. \_\_\_\_\_, 113 S.Ct. 2510, 125 L.Ed. 2d 74 (1993) (hereinafter "*Harper*"), where this Court held: 1) if a new rule is applied to the parties before the Court, the decision is to be applied retroactively thereafter to all pending cases and events; and 2) selective prospectivity is no longer a viable option for judicial rulings.

The second part of the Ohio Supreme Court decision violates the Supremacy Clause of the United States Constitution. The power to dictate that a decision will be applied retroactively is a necessary corollary to the power to interpret the United States Constitution. States may neither ignore nor evade federal retroactivity rules, either by applying the state's own doctrine of retroactivity, or by citing contrary provisions of the state's constitution.

### III. ARGUMENT

A. When This Court Has Applied a Decision to the Parties Before It, a State Supreme Court Has No Power to Determine that the Decision May Be Selectively Applied to Its Own Citizens.

The issues corresponding to the first part of the decision below are: 1) does *Bendix* leave the issue of retroactivity open? and 2) may *Bendix* be applied selectively on the basis of individual equities? Recent decisions from this Court answer both questions in the negative.

1. This Court did not "reserve" the issue of retroactive application in *Bendix*.

The Ohio Supreme Court majority assumed that because this Court "specifically declined to determine" whether its ruling in *Bendix* "should be applied prospectively only," it was up to the Ohio court to take on "the task of determining whether the *Bendix* decision is to be applied retroactively." Pet. App. at A4. The Ohio court misperceived its task. Because this Court applied the rule of *Bendix* to the parties before it, the retroactivity decision has already been made.

In *Bendix*, this Court refused to consider the petitioner's argument that its ruling should be applied prospectively only, because the issue was not preserved below. This Court then applied its ruling to the parties before it, affirming the decision of the Sixth Circuit, which in turn affirmed the District Court's grant of summary judgment in favor of the out-of-state defendant manufacturer. Thus, the petitioner's claims were barred by the statute of limitations and Ohio's tolling statute would not apply to save those claims.

The issue of retroactive application only remains open when this Court specifically reserves the question of "whether its holding should be applied to the parties before it . . ." *Harper*, 113 S.Ct. at 2518 (emphasis supplied), quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 539, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991) (hereinafter "*Beam*"). This Court did not reserve the question of whether its holding should be applied to the parties before it in *Bendix*—it applied its holding to the parties before it. Therefore, *Bendix* must be applied retroactively to all cases, regardless of whether the events of those cases predate the announcement of the rule.

This "bright line" rule is both workable and certain. It does require counsel to raise the issue of prospective application at the earliest opportunity in order to avoid the presumptive retroactive application of the rule announced. But exacting such a duty is a small price for the uniformity and judicial efficiency gained.

In the absence of the *Harper* rule, state and federal courts are left to speculate on the proper application of federal principles of retroactivity in all decisions in which this Court is silent on the issue. Courts understandably reach different conclusions, leading to disparate applications by different courts. This Court then must revisit its original decision, as in *Beam* and *Harper*, to determine which courts had guessed correctly. A bright line rule supports uniformity and efficiency. The rule is further supported by sound jurisprudential principles, as explained below.



2. "Selective prospectivity" may not be applied to decisions of this Court.

The Ohio Supreme Court further erred by resolving the issue of retroactivity according to the doctrine of selective prospectivity approved in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) (hereinafter "*Chevron Oil*"). This Court reversed state supreme court decisions in *Beam* and *Harper* precisely because those courts performed a *Chevron Oil* analysis. It is no more proper here than it was in those cases.

The doctrines of pure prospectivity and selective prospectivity represent deviations from jurisprudence of "near a thousand years" that judicial decisions must be applied retroactively. *Harper*, 113 S.Ct. at 2516, quoting, *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372, 30 S.Ct. 140, 54 L.Ed. 228 (1910) (Holmes, J., dissenting). According judicial decisions retroactive effect is based on courts' fundamental duty "to say what the law is," . . . not what the law *shall be*." *Harper*, 113 S.Ct. at 2523, quoting, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

Selective prospectivity does not even pronounce what the law "shall be." Instead, that doctrine applies the new rule to the parties before the court, but allows other courts to determine whether to apply the new rule according to an individual party's reliance on the old rule. In other words, it permits "the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of a new rule." *Harper*, 113 S.Ct. at 2517, quoting, *Beam*, 501 U.S. at 543.

First in *Beam*, and more emphatically in *Harper*, a majority of this Court abandoned selective prospectivity and required the retroactive application of judicial rules that are applied to the parties before this Court:

When this court applies a rule of federal law to the parties before it, that rule is a controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events pre-date or post-date our announcement of the rule.

*Harper*, 113 S.Ct. at 2517.

Again this year, this Court reiterated that selective prospectivity violates "the rules that necessarily govern our hierarchical federal court system." *Rivers v. Roadway Express*, \_\_\_\_\_ U.S. \_\_\_\_\_, 114 S.Ct. 1510, 1519, 128 L.Ed.2d 274 (1994) (cite omitted). When this Court definitively construes or strikes down a statute—as it did in *Bendix*—it declares what the statute has always meant, and how it should have been applied from the date of enactment:

It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.

*Id.* (footnote omitted). The footnote further explains that a decision of this Court does not "change" previously prevailing law from appellate courts, it



simply decides what the statute had *always* meant and explains why lower courts had misinterpreted the statute. *Id.*, n.12.

This definitive interpretation requires the dismissal of pending or accrued claims that were filed in reliance on an invalid or misconstrued statute. Such dismissals are not based on "fairness" principles, but represent risks that are inherent to the judicial system:

The essence of judicial decisionmaking—applying general rules to particular situations—necessarily involves some peril to individual expectations because it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation.

*Id.* (citation omitted).

*Bendix* did not overrule any previous decision of this Court.<sup>3</sup> It simply held that Ohio's tolling statute had always been a violation of the Commerce Clause, contrary to what any state and federal court of appeals may have previously stated. The "crucible" of litigation produced a decision from the highest authority in our judicial system that Ohio's tolling statute impermissibly burdened interstate commerce. Sound jurisprudence requires state and federal courts to apply that authoritative statement to all pending cases and previously occurring events.

<sup>3</sup> To the contrary, *Bendix* had been foreshadowed six years earlier. In 1982, this Court "decline[d] to resolve" a Commerce Clause challenge to a similar New Jersey tolling statute because the issue had not been addressed below. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 413, 102 S.Ct. 1137, 71 L.Ed.2d 250 (1982). But two justices urged consideration of the Commerce Clause challenge, noting its "considerable force." 455 U.S. at 420 (Powell, dissenting in part).

## B. The Supremacy Clause Requires States to Apply Constitutional Rulings of This Court, Even if such Application Contravenes the State's Constitution.

In the second part of its opinion, the Ohio Supreme Court held that "[e]ven if the *Chevron* test has been replaced by *Harper*, the retroactive application of *Bendix* remains impermissible." Pet. App. at A6. This holding is based on the court's improper assumptions that: 1) *Harper* allows state courts to "tailor" a remedy for retroactivity, including the "remedy" of selective prospectivity; and 2) a federal rule of retroactivity can be trumped by provisions of a state constitution. Both of these assumptions run afoul of the Supremacy Clause, Art. VI, Cl. 2 of the United States Constitution.

### 1. The Supremacy Clause prohibits states from ignoring, weakening, or annulling this Court's constitutional mandates.

In 1988, *Bendix* held that Ohio's tolling statute impermissibly burdened interstate commerce, contrary to the Commerce Clause of the United States Constitution. That decision became the "law of the land" as provided in Art. VI, Cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The justices of Ohio's Supreme Court were duty bound to enforce this Court's decision in *Bendix*, notwithstanding any contrary provision in Ohio's Constitution.

The Supremacy Clause must be given the full force of its import; it cannot be interpreted in a narrow or begrudging fashion. As early as 1819, this Court recognized that the clause encompassed three corollaries within its broad scope:

1. That a power to create implies a power to preserve.
2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve.
3. That where this repugnancy exists, that authority which is supreme must control, not yield, to that over which it is supreme.

*M'Culloch v. State of Maryland*, 17 U.S. 316, 426, 4 Wheat. 316, 4 L.Ed. 579 (1819).

Applying the Supremacy Clause and its corollaries, this Court has consistently reversed state attempts to evade or ignore controlling federal precedent, including attempts to invoke contrary state constitutional provisions, assert factual distinctions, or claim compelling state interests.

Thus, this Court held in *Reynolds v. Sims*, 377 U.S. 533, 584, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), that when a state's interpretation of its constitution conflicts with this Court's interpretation of the U.S. Constitution, the latter interpretation prevails. *Reynolds* held that the Alabama Supreme Court's interpretation of its constitutional provisions

on apportionment could not be used to avoid U.S. Supreme Court interpretations of the Equal Protection Clause. Rather, such contrary constructions created "an unavoidable conflict between the Federal and State Constitution" and "the Supremacy Clause of course controls." 377 U.S. at 584.

This Court held that the Supremacy Clause controls state attempts to distinguish U.S. Supreme Court decisions in *Henry v. City of Rock Hill*, 376 U.S. 776, 84 S.Ct. 1042, 12 L.Ed.2d 79 (1964). *Henry* was the second appeal to this Court of a conviction based on a state statute that punished unpopular speech. This Court had reversed and remanded once for further consideration in light of *Edwards v. South Carolina*, 372 U.S. 329, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) ("*Edwards*"). Upon remand, the South Carolina Supreme Court sought to distinguish *Edwards* and "intimated that the rule of *Edwards* was designed to guide us in determining our review of state action." *Id.* at 777. Reversing again, this Court noted that *Edwards* could not be relegated to an advisory role: "*Edwards* states a rule based upon the Constitution of the United States which, under the Supremacy Clause, is binding upon state courts . . . ." *Id.* Because the conviction at issue conflicted with *Edwards*, the South Carolina Supreme Court was duty bound to vacate the conviction.

Even compelling state interests must yield to this Court's interpretations of the U.S. Constitution. In *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958), this Court refused to allow Arkansas' state legislature to "suspend" desegregation ordered under



*Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), after receiving threats of mob violence. As this Court held:

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislators of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery . . . ." *United States v. Peters*, 5 Cranch 115, 136.

It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action.

358 U.S. at 18-19.

In *Bendix*, this Court declared Ohio's tolling statute to be an impermissible burden on interstate commerce conducted by out-of-state corporations. Ohio's judicial officers have sworn to enforce that decision as the law of the land and cease all efforts to enforce the invalid statute. Although it is true that Ohio's Supreme Court is responsible for enforcing the protections accorded by Ohio's constitution, that enforcement must be consistent with federal constitutional requirements. Applying an unconstitutional tolling statute to "save" time-barred claims is an unlawful means of enforcing the Ohio Constitution.

2. This Court's decision to apply a new rule retroactively is within the scope of the Supremacy Clause.

The Ohio Supreme Court first sought to justify its holding on the grounds that retroactivity is a "rule of decision" rather than a substantive holding within the Supremacy Clause. This semantic distinction is flawed both theoretically and as applied to this case.

*Harper* explicitly held that doctrines of retroactivity fall within the Supremacy Clause's mandate:

The Supremacy Clause . . . does not allow federal retroactivity doctrines to be supplanted by the invocation of a contrary approach to retroactivity under state law.

*Harper*, 113 S.Ct. at 2519. A power to create a rule of law implies the power to preserve that rule of law. *M'Culloch v. State of Maryland*, *supra*, 17 U.S. at 426. To preserve a rule of law, a court must have the power to determine its application by state and federal courts.

The fallacy of the Ohio Supreme Court's attempt to create a distinction between a supreme "law" and a subservient "rule of decision" becomes even more apparent as applied in this case. This Court would not only have to overrule *Beam* and *Harper* to affirm the decision below, but the Supremacy Clause itself. In *Beam*, this Court held that *Georgia's* Supreme Court must retroactively apply a decision of this Court that had struck down a similar *Hawaii* statute. In *Harper*, this Court held that *Virginia's* Supreme Court must apply this Court's decision striking down a similar *Michigan* statute. Here, the *Ohio* Supreme Court has



refused to enforce this Court's decision striking down an *Ohio* statute, based on an allegedly contrary provision in Ohio's Constitution. It has thereby given new life to the very statute this Court found to be an impermissible burden on interstate commerce. Under these circumstances, the Supremacy Clause mandates a reversal of the repugnant state decision.

3. The Supremacy Clause proscribes state-created "remedies" that evade this Court's interpretations of the U.S. Constitution.

The Ohio Supreme Court next relies on references to "remedy" in *Beam* and *Harper* to support its decision. "Remedy" in those cases refers to *enforcement* of the Supremacy Clause, not its evasion, and cannot support the decision below.

*Beam* and *Harper* involve the unlawful exaction of a tax by a state. Two federal constitutional issues arise in such cases: 1) does the tax itself violate the commerce clause or some other federal constitutional provision? and 2) if so, does the state provide the taxpayer an adequate pre-deprivation or post-deprivation hearing to comport with the due process requirements of the Fourteenth Amendment? The second "remedy" issue comes into play only after it has been settled that the rule of law will apply to the parties before the Court. *Beam*, 501 U.S. at 539. See, e.g., *Hagge v. Iowa Dept. of Revenue & Finance*, 504 N.W.2d 448 (Iowa 1993), applying this Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), retroactively to strike down a state tax statute and separately analyzing the adequacy of the "remedy" available to plaintiffs under state refund laws.

Here, there is no constitutional "remedy" issue to be decided after, and apart from, retroactivity. No state entity has deprived Respondent of monies or other property without a hearing or other due process. Rather, a private plaintiff's expectations of a potential judgment have simply been disappointed as the result of the "crucible of litigation." *Rivers v. Roadway Express, supra*, 114 S.Ct. at 1519.

Even in cases where remedy is at issue—such as *Beam* and *Harper*—the remedy may not annul the retroactive application of the new rule. In both *Beam* and *Harper*, the remedy to be tailored by the state courts was one which would implement this Court's decision that the tax was unconstitutional. The Ohio Supreme Court has offered no authority or rationale for its conclusion that it can impose a "remedy" which *annuls* this Court's decision that Ohio's tolling statute is unconstitutional. Compare *Hyde*, Pet. App. at A16 (J. Wright, dissenting) ("[O]ur state constitution cannot be used to accomplish what the Commerce Clause forbids").

## IV. CONCLUSION

The Ohio Supreme Court has, in effect, declared Ohio's constitutional "open courts" provision to be superior to the Commerce Clause of the United States Constitution. Thus, Ohio's Supreme Court has held—notwithstanding this Court's explicit 1988 decision that the state's "tolling" statute is unconstitutional—that Ohio courts may continue to enforce the impermissible statute.

Ohio justices are sworn to uphold the United States Constitution. They cannot pick and choose which portions of this Court's decisions will apply in Ohio, and to which parties. Here, the Ohio Supreme Court has not only refused to apply a constitutional ruling issued by this Court, but it has refused to apply the ruling that struck down the very statute the Ohio court seeks to enforce.

Pursuant to the Supremacy Clause of the United States Constitution, this Court should reverse and enter judgment in favor of Petitioner.

Respectfully submitted,

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October 31, 1994

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134 West 46th Street  
Ashtabula, Ohio 44004

David J. Eardley, Esq.  
114 East Park Street  
Chardon, Ohio 44024

Re: No. 94-3; Reynoldsville Casket Co., et al.,  
Petitioners v. Carol L. Hyde, Respondent

Gentlemen:

This will confirm my telephone conversations with both of you seeking consent for the Dalkon Shield Claimants Trust Fund -- which was granted leave to appear as amicus on the petition -- to appear as amicus in the merits proceeding. As you know, United States Supreme Court rules require consent be separately granted to the merits proceeding, and that said consent be in writing. It is my understanding that Petitioners consent; Respondent does not.

In order to comply with U.S. Supreme Court rules, I would request Mr. Riedel to briefly confirm in writing his consent. Unless I hear from Mr. Eardley to the contrary within the next two weeks, I will prepare another motion for leave to appear, based on his refusal to consent.

If you have any questions, please do not hesitate to call.

Yours truly,

*Irene C. Keyse-Walker*

Irene C. Keyse-Walker

IKW:lme:6395

A1  
Exhibit "A"

IN COLUMBUS	IN DALLAS	IN IRVINE	IN LOS ANGELES	IN WASHINGTON, D.C.
ARTER & HADDEN	ARTER, HADDEN, JOHNSON & BROMBERG	ARTER & HADDEN	ARTER & HADDEN	ARTER & HADDEN
10 West Broad Street, Suite 2100 Columbus, Ohio 43215-3422 614/221-3155	1717 Main Street, Suite 4100 Dallas, Texas 75201-4605 214/761-2100	2 Park Plaza, Suite 700 Irvine, California 92714-8517 714/252-7500	700 South Flower Street, Suite 3000 Los Angeles, California 90017-4250 213/629-9300	1801 K Street, N.W., Suite 400K Washington, D.C. 20006-1501 202/775-7100

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Theodore E. Warren (1897-1969)  
M. H. Young (1910-1971)

November 2, 1994

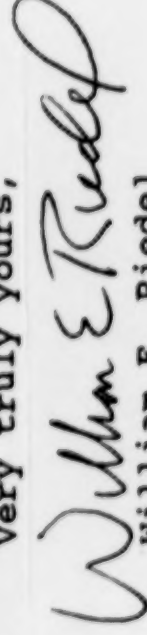
Irene Keyse-Walker  
ARTER & HADDEN  
1100 Huntington Building  
Cleveland, OH 44115-1475

Re: Reynoldsville Casket Co., et al., Petitioners  
v. Carol L. Hyde, Respondent  
United States Supreme Court Case No. 94-3

Dear Ms. Keyse-Walker:

This will confirm Reynoldsville Casket Co., Petitioner,  
hereby consents to the Dalkon Shield Trust's appearance as amicus  
curiae in the captioned case.

Very truly yours,

  
William E. Riedel

WER:djk

B1  
Exhibit "B"



C1

Exhibit "C"

[CRF-1]

ANNEX 4  
PLAN EXHIBIT C

**DALKON SHIELD TRUST  
CLAIMS RESOLUTION FACILITY**

**A. Purpose**

The purpose of the facility is to provide all persons full payment of valid claims at the earliest possible time consistent with the efficient design and implementation of the claims resolution facility. This purpose is to be achieved by (1) providing an efficient economical mechanism for liquidating claims which favors settlement over arbitration and litigation, thereby reducing transaction costs, (2) providing claimants with an attractive alternative to trial by jury where settlement is not achieved, (3) providing fair and equitable compensation based upon historic values, updated by current developments, to persons injured by the Dalkon Shield, and (4) providing no compensation to persons not injured by the Dalkon Shield. The Trustees shall, as soon as practicable, design and implement a facility for the resolution of Dalkon Shield Claims. The facility is to be designed and operated in accordance with the guidelines set forth below.

**B. Initial Mailing, Forms, Notice, Option Election**

Following the Consummation Date, the Trust shall as promptly as possible mail to each claimant a packet containing instructions, a "short form" request for payment, a detailed claims settlement information form, a future claim deferral form and such other materials as the Trustees deem

appropriate. The instructions and forms shall be in accordance with the provisions set forth below. Where the claimant resides in a country where English is not the native or an official language, the materials in the packet shall be to the extent practicable in the native language of the claimant's country. In accordance with the terms of the Confirmation Order, any claimant who fails to return the appropriate form within twelve months from the date of mailing shall have his or her claim disallowed, unless the claimant is able to demonstrate to the satisfaction of the Trustees that the failure should be excused. The Trust shall send to each claimant who has not responded within ten months a notice that his or her claim will be disallowed if a response is not made within the allotted time.

Claimants shall be given the opportunity to elect any one of three ways for proceeding under the Claims Resolution Facility. The claimant shall make her or his election by completing and sending to the Trust the appropriate form of Claimant Affidavit, described below.

**C. Option 1 of Claims Process: Short Form/Instant Offer**

The Trustees shall develop a "short form" claim procedure and forms permitting claimants who elect to do so to receive payments upon a minimal showing of Dalkon Shield use and injury. The procedure is intended to (1) permit electing claimants to receive a prompt payment and (2) permit the Trust to process small claims without substantial transaction costs. The Trustees shall, thus, set for each of the various categories of claimants (*e.g.*, Dalkon Shield users, non-

users—husbands, non-users—injured child) a payment which is sufficiently large to attract claimants with *de minimis* claims, but not so large as to exceed the cost of processing the claims through options 2 or 3.

If this option is selected, the Trust waives all defenses to the claim, other than challenges based on duplication of the claim, previous payments, previous disallowance by the Court, or late filing.

The claimant elects this option by executing the appropriate Claimant Affidavit, in which (s)he attests (a) if she is claiming as a user of the Dalkon Shield, that she used a Dalkon Shield and was injured or believes she may have been injured as a result of such use, or (b) if the Claimant is not claiming as a user of the Dalkon Shield, that such claimant was injured or believes (s)he may have been injured by the use of a Dalkon Shield by another. The Trustees may, in considering any request for payment under this option, give consideration to any additional information previously submitted by the Claimant to the Court or the Trust. In cases where, on the face of the Claimant Affidavit or as [CRF-2] between the Claimant Affidavit and the additional information submitted by the claimant to the Court or the Trust, there is conflicting evidence as to Dalkon Shield use or injury, the Trustees may make such additional inquiries as they deem appropriate and may, in their discretion, offer a lesser amount or no amount.

**D. Option 2 of Claims Process: Claim Form/Tailored Offer**

The Trustees shall develop a "second option" claim procedure and forms permitting claimants, who elect to do so, to receive a specified payment in accordance with a schedule. The schedule shall include



specified settlement amounts for each of the injuries on Exhibit A hereto. In addition, the Trustees may prepare a schedule that varies the award for the same injuries according to the type and volume of the documentation the claimant submits. Whether or not to accept the schedule payments shall be at the sole option of the claimant. In establishing a schedule of payments, the Trustees may take into account the waiver of defenses and the waiver of detailed fact discovery by the Trust, as described below.

If this option is selected and its requirements met, the Trust waives all defenses to the claim other than challenges based upon the claim duplicating other claims by the same claimant, previous payment, late filing, previous disallowance of the claim by the Court or invalidity of information submitted to support the claim. Under this second option, unlike the first, the claimant shall be required to attest to the specific injury or injuries for which (s)he is claiming, and to answer, under oath, additional relevant questions relating to Dalkon Shield use and injury. In addition, the claimant shall be required to submit in support of the Claimant Affidavit electing this option (A) either (1) medical records ("Medical Records") showing Dalkon Shield use or (2) an affidavit of a physician or health care provider that (s)he inserted, removed, or visualized an IUD in the user and that the IUD was more likely than not a Dalkon Shield ("Medical Evidence"), and (B) Medical Records to substantiate that the claimant actually sustained the scheduled injury for which the claim is made and such other evidence as the Trustees may deem appropriate.

If Option 2 is selected, the claimant may not proceed to Option 3 unless and until she has been denied compensation under Option 2. A claimant

electing this option shall be paid the amount listed on the schedule for the most serious injury category in which the injury claimed by the claimant falls.

**E. Option 3 of Claims Process: Complete Form/Early Evaluation/Offer/Arbitration/Trial**

1. *Complete Form.* The Trustees shall develop a "third option" claim procedure and forms for a claimant who does not liquidate her or his claim under Option 1 or Option 2. Under this option, the claimant shall submit (1) a completed claimant information form, (2) all Medical Records of any injuries and damages alleged to have resulted from use of the Dalkon Shield by the claimant, and (3) Medical Records or Medical Evidence regarding use of a Dalkon Shield by the claimant or an affidavit of the claimant stating that she used the Dalkon Shield and explaining the basis of this knowledge.

2. *Early Evaluation.* The claim will be evaluated (i) by developing a profile of the claim based upon criteria relevant to case value, including, without limitation, information as to the nature of the injury or damages claimed, whether the claimant is a wearer of a Dalkon Shield or is making a claim based upon another person's use of a Dalkon Shield, information contained in the claimant's claim file or the claim file of a related claim, and any defenses available to the Trust at this step; (ii) by comparing the profile to corresponding profiles based upon historical data; and (iii) by establishing an amount, if any, at which the comparison of the claimant's profile with historical profiles suggests that the claim should be allowed, taking into account the quantum and quality of the evidence supporting the claim, absence of in-depth

scrutiny or discovery, the waiver by the Trust of defenses based upon the statute of limitations not evident from the face of the documents supplied or the face of the information form, lack of necessity of presentation of other evidence necessary under Option 3, other particularities that distinguish the pending claims from ones previously resolved, and any other factors the Trustees deem relevant.

3. *Early Evaluation Offer.* As soon as practicable after the claimant's delivery to the Trust of a completed information form and all necessary documentation, the Trust shall mail to the claimant a statement of the amount, if any, which the Trust offers to pay in satisfaction of the claim and a brief [CRF-3] report setting forth the reasons therefor. The claimant shall be obligated to respond in writing, within time limits to be established by the Trust, to the statement and report. The claimant shall indicate whether the offer is accepted or rejected. If the claimant rejects the offer, she may make a counteroffer, and the parties may resolve the matter at that or some other amount. If the matter is not resolved, the claim shall proceed to the next level.

4. *In-Depth Evaluation Offer/Voluntary Settlement Conference or Alternative Dispute Resolution.*

If the claim proceeds to the next level, the Trust shall undertake an in-depth review of the claim and invite the claimant to a voluntary settlement conference or any other voluntary alternative dispute resolution process as appropriate. The conference shall, to the extent practicable, be held at a location reasonably convenient to the claimant. The conference shall be attended by the claimant and a representative

of the Trust responsible for the evaluation of the claim. Either party may also be accompanied by legal counsel or other representative, provided that reasonable notice is given to the other party of attendance by such representatives. At the claimant's option, the claimant's representative may attend by himself or herself.

If a settlement is not sooner reached, not later than 60 days after the conference, both parties must submit to the other a written settlement proposal which shall remain in effect until 90 days after the conference. If neither party accepts the other's offer during this period, the claimant may proceed to arbitration or trial.

The Trust may request the claimant to provide additional information about the claim at any time during the evaluation process. Any such request shall be made in writing by the Trust, and responded to in writing by the claimant, in a manner which verifies the accuracy of the information furnished, the unavailability of any of the requested information not furnished, and, if applicable, the claimant's unwillingness to furnish any of the information requested and the reasons therefor.

5. *Voluntary Binding Arbitration or Trial.* If a settlement is not reached at the settlement conference level and the claimant has completed the preceding procedures under Option 3, the claimant shall elect either Binding Arbitration or a trial. A claimant may elect to go to binding arbitration or trial only after having applied for and received a response from the Trust at the preceding level of this Option 3.



(a) *Binding Arbitration.* The arbitrator shall be chosen from a panel of arbitrators that is selected by a neutral third party and maintained by the Trust. Arbitrators may serve for a maximum of 2 years. The hearing shall be in a location which minimizes, to the greatest extent practicable, the travel burden on the claimant. The issue to be arbitrated is the amount, if any, at which the claim should be allowed. In Binding Arbitration, the arbitrator will consider the record available in the in-depth review; the decision and offer of the Trust and the claimant; any evidence offered, including expert testimony concerning causation; evidence offered by either party as a result of medical examinations, tests or other procedures requested by the Trust; and arguments of the claimant and the Trust. Both the claimant and the Trust will have the right to be represented in Binding Arbitration by advocates, who need not (but may) be lawyers.

The arbitrator may obtain a report from an independent medical doctor or independent epidemiologist or other expert from a list of such consultants selected by a neutral third party and maintained by the Trust for independent advice on disputed medical and causation issues raised by the parties. If such a report is obtained, it shall be made available to the parties with sufficient time for them to make a response. In Binding Arbitration, all available defenses may be asserted by the Trust, other than absence of product defect. Upon completion of Binding Arbitration, the arbitrator shall issue a written award, if any, or the denial of the claim. Awards shall be for compensatory damages only.

In the event that both the Trust and the claimant agree, the arbitrator, instead of independently determining the amount of the award, shall select

either the amount demanded by the claimant in the final Option 3 proposal or the amount offered by the Trust in the final Option 3 proposal, and no other amount shall be selected. The arbitrator's award shall be binding on the claimant and the Trust.

All Arbitration Awards shall be enforceable under the Federal Arbitration Act. The Trustees shall develop such further rules concerning arbitration as they may deem appropriate.

[CRF-4] (b) *Trial.* The right to a jury trial shall be preserved, but the defendant in all trials (including jury trials) shall be the Trust and not the Debtor or Successor Corporation. The Court shall have the power to stay the commencement of any trial upon a showing by the Trust of undue prejudice due to the multiplicity of ongoing trials. Where a complaint was pending on August 21, 1985, the action shall resume, upon the claimant's completion of the Claims Resolution Process, from the point at which it was frozen, except that the Trust shall be substituted as a party defendant in place of the Debtor. Where no complaint had been filed as of August 21, 1985 the claimant, upon completion of the Claims Resolution Process, shall file a complaint naming the Trust as defendant (not the Debtor or any Successor Corporation). Venue shall be unchanged by the chapter 11 case. All claims and defenses shall be available to both sides in a trial.

For the purpose of minimizing defense costs, the Trustees should give due consideration to, and, as may be appropriate, seek a pretrial order incorporating, the following:

(1) The Trust shall have available to it all defenses, except any defense that would purport to establish that the Debtor was not liable for injuries caused by the Dalkon Shield.

(2) The Trust shall be deemed to have conceded product defect and that the product defect caused the Dalkon Shield injury, and the claimant shall be precluded from introducing any evidence on the product defect issue.

(3) The last offer of settlement made by the Facility to the claimant, if any, shall be deemed to be an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure.

(c) *Discovery.* For the purpose of minimizing defense costs, the Trustees shall also give due consideration to the coordination of discovery (1) through a multi-district litigation panel under 28 U.S.C. § 1407 and/or (2) through the Court. Upon application to the Court by the Trustees, the Court may, for good cause, exercise its power, including its power under 28 U.S.C. §§ 157 and 1334, to limit, control, coordinate or consolidate discovery undertaken or requested in connection with any trial or arbitration proceeding.

#### **F. Option 4 of Claims Process: Deferral**

A claimant may elect to defer consideration of his or her claim without waiving any rights of that claim. Such claimant shall fill out the Claimant Information Form, to the extent applicable, and provide Medical Records or Medical Evidence of Dalkon Shield use to the extent available, and, if applicable, removal. Thereafter, the Trust shall periodically send each deferred claimant a notice reminding the claimant of

the procedures for activating a claim and requesting notification of any change in address. In the first month of the third year following the Consummation Date, the Trust shall send all remaining deferred claimants notice that any claim based upon an already manifest injury not activated in 90 days will be disallowed. A deferred claim shall be activated when the claimant sends the Trust a letter indicating that she or he desires to activate the claim. The Trust shall then send the claimant a new Claimant Information Form for completion and the determination of the claim shall proceed as provided for herein. A claimant who elects to defer consideration shall not file or pursue any legal action with respect to the claim during the period of deferral, and when such a claimant requests a claim be moved to active consideration, the request must be in the form of a choice of one of the three options referred to above.

#### **G. Guidelines**

The following guidelines shall govern the Claims Resolution Facility and Claims Resolution Process:

1. *Order of Consideration of Claims.* Claimants who elect either Option 1 or Option 2 of the Claims Resolution Process shall have their claims processed by the Trust in chronological order of receipt, based upon the date on which the Trust has received all documentation necessary to process the claim. Claimants who elect Option 3 shall have their claims processed in chronological order based upon the date on which the Trust has received all documentation necessary to process the claim at that step; provided, however, that Option 3 claims which are either lawsuits that were pending on August [CRF-5] 21, 1985, or are asserted by claimants who were included



in the samples requested to complete a questionnaire during the Court's claims analysis process and who returned a completed questionnaire shall be given priority in processing over all other Option 3 claims by being placed on a priority processing list in the order of the date on which the Trust has received all documentation necessary to process the claim at Option 3. The Court shall provide the Trust a list of the sampled claimants who returned a questionnaire.

Notwithstanding the foregoing provisions, the Trustees may consider and pay claims in any order for reasons of hardship or necessity or major efficiencies in claim handling.

2. *Scheduled Compensable Claims.* In determining whether an injury could have been caused by the Dalkon Shield and, therefore, could be eligible for compensation, the Trust shall presume that the injuries listed in Exhibit A are eligible for compensation. The Trust shall consider on a case by case basis whether any injury not in Exhibit A is eligible for compensation.

3. *Payments.* The Trustees shall pay claims in a manner designed to ensure that all claims are paid in the same proportions. While it is intended that each claimant receive a substantial portion of his or her award immediately upon the determination of her or his claim, the Trustees may withhold some portion of the amounts awarded under Option 3 for claims and pay the balance withheld at such times and in such amounts as necessary to ensure equality in distribution among claimants and the continued availability of funds to pay all valid non-subordinated claims. The Trustees may also determine that

compensatory damages awarded under Option 1 or Option 2 shall be paid in full immediately upon liquidation.

4. *Confidentiality.* Claim files and all communications between the Trust and a claimant or between the trust and any other person about any claimant are in the nature of settlement discussions and shall be strictly confidential.

5. *Claims Assistance by Trust Contacts.* The Trust shall endeavor to assist every claimant in the processing of her or his claim to the extent reasonable and practicable. At the time the Trust mails to the claimants the forms of Claimant Affidavits, described below, it shall also send each claimant to whom the Affidavits are sent the name, mailing address and telephone number of a representative of the Trust who has been assigned to assist the claimant in submitting her or his claim and to assist the Trust in processing the claim (the "Trust Contact"). To the extent practicable, the Trust Contact assigned to a claimant initially shall remain the Trust Contact for that claim until it is finally processed. Upon request by the claimant, the Trust Contact shall assist the claimant by answering questions about such matters as procedures, requirements, the status of the claim, and its priority for processing.

6. *Foreign Claims.* In evaluating and paying the claims of claimants residing in foreign countries, the Trustees shall take into consideration, but not be bound by, the laws as well as the treatment of claims in that country of claims such as that made by the claimant. The Facility shall not be required to hold voluntary settlement conferences outside the United

States; provided, however, that the Facility is not prohibited from holding voluntary settlement conferences outside the United States.

7. *Random Audits.* The Trust may conduct random audits to verify Medical Records and Medical Evidence submitted in connection with any other step in the Claims Resolution Process and may audit individual claims as appropriate.

8. *Costs.* The Trust and claimants shall each bear their own costs, expenses, and attorneys' fees in connection with the Claims Resolution Process, except as provided otherwise by law.

9. *Reference Materials.* In processing and valuing claims and in preparing forms and materials for those purposes, the Trustees may review and, to the extent they deem appropriate, consider the valuation factors and the procedure developed in connection with the Court's claims analysis process, including, but not limited to, the documentation on file with the Court.

10. *General Release.* As a condition to making any payment to a claimant, the Trust shall obtain a general release of all Persons except Aetna and the Trust; provided, however, that such general release shall not release claims which are based exclusively on medical malpractice and which cannot be asserted or brought over either in whole or in part, against the Trust, the Other Claimants Trust, Robins, the Successor Corporation, any Affiliates thereof, or any other Person intended to be pro-[CRF-6]tected either by the release described in Section 8.03 of the Plan or the injunction described in Section 8.04 of the Plan. Notwithstanding the foregoing, Aetna shall be

included in the general release if and when Aetna shall have performed its obligations under a Qualified Breland Settlement, except that if a claimant validly exercised the right, if any, to opt out from the *Breland* class, the general release shall be obtained upon the tender of final payment of the full amount awarded under this claims resolution facility. The Trust shall be released at the time it satisfies the award of compensatory damages given a Personal Injury Claimant by way of settlement or judgment. If allowed by state law, the endorsing of a check or draft by or on behalf of the claimant shall be additional evidence of such a release.

11. *Applicable Law.* The law to be applied to the settlement or trial of claims shall be the law that is or would have been applicable notwithstanding the pendency of the chapter 11 case; provided, however, that the statutes of limitations and repose applicable to claims are tolled in accordance with the Bankruptcy Code. Pursuant to this provision, claimants who would have been or are entitled to file suit in Maryland may avail themselves of the Maryland law concerning the accrual and limitation of actions. Notwithstanding anything in this paragraph, punitive damages shall not be paid, except as provided in section 14 below. In order to reduce costs, the Trustees may waive the statute of limitations defense for purposes of settlement and take into account normal deductions for the statute of limitations defense.

12. *Product Defect.* In Options 1 and 2 of the Claims Resolution Process and Option 3, except for trial, product defect, including but not limited to design and warning defect, is not to be contested by the Trust and shall not be the subject of proof.



13. *Causation.* Causation will be in issue except as waived by the Trust. However, the Trust shall at all times, consistent with its purposes, minimize the intrusion into such private matters as the users' frequency of sexual relations, number of sex partners, age of onset of intercourse, sexual practices, and the like.

14. *Priorities Among Claims.* Claimants who have claims for compensatory damages which are meritorious and which are not time-barred shall have first call on the funds of the Trust. To the extent funds remain after all such claims are paid in full, meritorious compensatory damage claims which are time-barred shall then be administered and paid from the funds of the Trust. To the extent funds (not including Aetna Insurance) remain after all such claims are paid in full, the remaining funds shall be paid in lieu of punitive damages to all claimants (other than holders of Dalkon Shield Liquidated Claims) who received compensatory damage awards from the Trust, on a pro rata basis consistent with such awards. The Trustees may, in their discretion, set a *de minimis* amount below which such payments need not be made.

15. *Determinations Concerning Late Claims.*

(i) For purposes of this section, "Late Claim" means Dalkon Shield Personal Injury Claims for which notices or proofs of claim were not sent or received by the deadline set in the Bar Order in the Case and which have not previously been disallowed by either the Court or the Trust; provided, however, for purposes of this section only, the general disallowance of Late Claims as set forth in Section 7.02(a)(ii) of the Plan shall not constitute a previous disallowance by the Court unless the Dalkon Shield Personal Injury Claimant was previously barred by

the Court for failure to timely file a Court questionnaire.

(ii) After the Consummation Date, the following procedures shall be used to determine whether Late Claims shall be entitled to consideration and treatment on par with timely-filed Dalkon Shield Personal Injury Claims ("Timely Claims"):

(a) Within a reasonable time after submission of a Late Claim for consideration, the Trust shall seek to determine whether excusable neglect or other valid legal cause exists for treating and considering such Late Claims as and with Timely Claims. In undertaking this determination, the Trust may consider, *inter alia*, the following factors.

(I) whether the Late Claim is based upon injuries which first became manifest after the commencement of the Case or the bar date established by the Bar Order;

[CRF-7] (II) whether the holder of the Late Claim had actual knowledge of the bar date established by the Bar Order;

(III) whether the holder of the Late Claim had actual knowledge of Dalkon Shield use prior to the bar date established by the Bar Order; and

(IV) whether the holder of the Late Claim acted diligently with respect to the Late Claim under the particular circumstances surrounding the Late Claim.

For purposes of this section, appropriate evidence of a first manifestation of injury subsequent to April 30, 1986, and either lack of actual knowledge of the bar date or lack of knowledge of Dalkon Shield use shall constitute "excusable neglect."

(b) Following its determination, the Trust shall issue a written report containing its findings and

recommendations regarding whether it believes excusable neglect or other valid legal cause exists for treating and considering such Late Claim as if it were a Timely Claim. The report shall be mailed to the holder of the Late Claim and filed with the Court. The Court shall consider the Trust's report, together with any information that the holder of the Late Claim submits, and determine whether such Late Claim is entitled to be treated and considered as if it were a Timely Claim. The holder of the Late Claim shall be entitled to a hearing upon request and reasonable notice to the Trust. The Trust's findings and recommendations shall not be binding upon the Court.

(c) The Trust shall adopt procedures to minimize the expense and burden to the Trust and the holder of the Late Claim of a late-claim determination and to ensure the authenticity and credibility of the evidence it considers. To the extent practicable, the procedures hereunder shall allow for the submission of all relevant records, affidavits and other evidence by mail; provided, however, that the holder of a Late Claim shall be entitled to appear before the Trust, with or without counsel, at a mutually convenient time and place.

(d) Any Late Claim based upon an injury which first became manifest prior to the commencement of the Case and which, following completion of this process, is not to be treated and considered as if it were a Timely Claim shall be treated and considered only in accordance with the provisions of the second sentence of section 14 hereof.

#### **H. Further Provisions**

The Trust shall use its best efforts to provide, to the fullest extent possible, previously developed discovery materials including depositions and other

documents as a means of providing any discovery ordered or permitted by any court of competent jurisdiction in a trial by jury, without calling upon the Debtor, its present or former officers, directors, employees, agents, or representatives and will attempt, through court rulings or consensual procedures, to consolidate and coordinate pre-trial discovery and/or trial proceedings. In addition, the Trust shall use its best efforts to insure that the Debtor, its present or former officers, directors, employees, agents, or representatives shall not be needed in the arbitration proceedings.

#### **I. Time Periods**

The Trustees shall be able, in their discretion, to waive or modify in particular cases any time period created herein.

#### **J. Nonadmissibility**

Neither the Claims Resolution Facility nor any of the terms or provisions thereof shall be admissible for any purpose in any judicial proceeding.

#### **K. Emergency Fund**

The Trustees shall establish a program for providing immediate payments to qualified claimants who could benefit from reconstructive surgery or in vitro fertilization. Such payments shall not exceed \$15,000 for any one claimant and would be credited against the compensation subsequently awarded to the claimant pursuant to the Claims Resolution Facility. In developing this program, the Trustees should consider, but are not bound by, the emergency fund program approved by the Court on May 21, 1987.



**C20****[CRF-8]****EXHIBIT A****User Claims**

PID (Pelvic Inflammatory Disease), uncontrolled bleeding, subacute/endometritis, or subacute salpingitis, with or without any of the following sequelae and consequences of the disease:

- Permanent infertility
- Temporary infertility (impaired fertility)
- Ectopic (extrauterine, or tubal) pregnancy
- Surgery
- Hospitalization
- Loss of organs
- Emotional injury
- Pain and suffering
- Complications from any of the above
- Death
- Economic injuries in the nature of
  - medical expenses
  - wage losses
  - adoption expenses (where infertility is established)

Perforation or embedment of the Shield resulting in surgical removal with or without any of the following consequences:

- Permanent infertility
- Temporary infertility (impaired fertility)
- Infection

**C21**

- Ectopic (extrauterine, or tubal) pregnancy (where infection is established)
- Hospitalization
- Loss of organs
- Emotional injury
- Pain and suffering
- Complications from any of the above
- Death
- Economic injuries in the form of
  - medical expenses
  - wage losses
  - adoption expenses (where infertility is established)

Pregnancy which occurred with a Shield in place and terminated in spontaneous abortion (miscarriage), septic spontaneous abortion, induced abortion, or premature delivery, and any of the following consequences:

- Permanent infertility

**[CRF-9] — Surgery**

- Hospitalization
- Loss of uterus
- Emotional injury
- Pain and suffering
- Complications from any of the above
- Death
- Injury to the user's child

## C22

- Economic injuries in the nature of
  - medical expenses
  - wage losses
  - adoption expenses (where infertility is established)

Pregnancy which occurred with a Shield in place and terminated in the birth of a child with a birth or congenital defect or birth injury.

### Child of User Claims

A birth injury resulting from premature or otherwise abnormal birth to a child born to a mother who had a Shield in place at some time during her pregnancy with the child and who delivered the child prematurely.

A congenital or a birth defect injury in a child born to a mother who had a Shield in place at the time of conception.

Economic injury to the child resulting from either claim described immediately above, in the nature of

- medical expenses
- wage losses

### Father of Child User Claims

Emotional injury resulting from an injury to the claimant's child of the types described above under Child of User Claims.

Economic injury to the claimant resulting from an injury to his child of the types described above under Child of User Claims.

## C23

**Husband**—Losses of consortium under applicable substantive law.

### Estate Claims

Any type of claim listed above which is asserted by the estate of a deceased person as a wrongful death claim.

### Representatives' Claims

Any of the above types of claims which are asserted by a person who has been appointed by the court to act in a representative capacity due to incapacity of the claimant, such as a

- personal representative
- guardian ad litem
- conservator